FILE COPY

No. 647

Office - Supreme Court, U. S.
FILED
DEC 24 1937
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1937

BATES MANUFACTURING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

CHARLES B. RUGG
H. BRIAN HOLLAND
WARREN F. FARR
EVERETT H. MAXCY
Counsel for Petitioner.

PRESS OF GEO. H. DEAN CO., BOSTON

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	2
Specification of Errors to be Urged	4
Reasons for Granting the Writ	4
Appendix	12

CITATIONS

Cases:

Anderson v. *Aetna Life Insurance Co.*, 75 N. H. 375 9
Bachmann, Emmerich & Co., Inc. v. *United States*, 1935 C. C. H. Fed. Tax Service, Vol. 3-A, par. 9427 5
Brown v. *Babbington*, 2 Ld. Raymond 880 9
Creasy v. *United States*, 4 F. Supp. 175 5
Gibson v. *Pittsburgh Transportation Co.*, 311 Penn. 312 9
Greathouse v. *United States*, 166 U. S. 601 10
Irving Trust Co. v. *United States*, 1935 C. C. H. Fed. Tax Service, Vol. 3-A, par. 9600 ..... 6, 11
Jones v. *United States*, 1936 C. C. H. Fed. Tax Service, Vol. 4, par. 9072 ..... 6, 11
Kepner v. *United States*, 195 U. S. 100 9
Linn & Lane Timber Co., v. *United States*, 236 U. S. 574 9
Little v. *United States*, 54 F. (2nd) 711 ..... 6, 11
Mound City Co. v. *Castleman*, 187 Fed. 921 9
Munro v. *United States*, 89 F. (2nd) 614 ..... 4, 5, 6, 7, 9, 10
Pierce v. *Tiernan*, 280 Mass. 180 ..... 8, 9
United States v. *Sanges*, 144 U. S. 310 9
Walton v. *United States*, 73 F. (2nd) 15 ..... 7, 8
Wilhelm v. *United States*, 18 F. Supp. 600 ..... 6, 11
Woolford Realty Company v. *Rose*, 286 U. S. 319 8

Statutes:

Act of Mar. 3, 1887, c. 359, 24 Stat. 505 (Tucker Act):
§1 10
§5 (U. S. C., Title 28, §762) 2, 3, 4, 8, 9, 10, 13
§6 (U. S. C., Title 28, §763) 3, 4, 5, 6, 8, 9, 10, 13

Judicial Code:

§24 (20) (U. S. C., Title 28, §41 (20)) 12
Revised Statutes, Sec. 1069 (U. S. C., Title 28, §262) 10
Revised Statutes, Sec. 3226, as amended 2, 3, 4, 8, 10, 12

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. ——

BATES MANUFACTURING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Bates Manufacturing Company, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above cause on December 8, 1937, affirming a judgment of the District Court of the United States for the District of Massachusetts.

OPINIONS BELOW

The opinion of the District Court (R. 11-13.) is reported in 19 F. Supp. 526. The opinion of the Circuit Court of Appeals (R. 19.) is not yet reported.

JURISDICTION

The judgment of the court below was entered December 8, 1937. (R. 30.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an action against the United States in the District Court to recover taxes illegally collected is begun within the meaning of Section 3226 of the Revised Statutes, as amended, when a petition is filed in the District Court under Section 5 of the Tucker Act (U.S.C., Title 28, Sec. 762).

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 12-14.

STATEMENT

The material facts set forth in the plaintiff's petition, which must be considered as admitted by the Government's motion to dismiss, together with other relevant facts of record, may be summarized as follows:

The plaintiff duly filed, within the applicable period of limitation, claims for the refund of income, excess profits, and war profits taxes paid by it for the calendar years 1917-1921 inclusive, and alleged to have been erroneously and illegally assessed and collected. (R. 2, 4, 6.) All of said refund claims were rejected by the Commissioner of Internal Revenue on March 22, 1927. (R. 2, 6.) On

March 21, 1929, the plaintiff filed in the office of the Clerk of the District Court of the United States for the District of Massachusetts a duly verified petition seeking judgment against the United States for the refund of $313,349.71, being a portion of the taxes referred to in said claims for refund. (R. 1-7.) A copy of the petition was served by counsel for the plaintiff on the United States Attorney for the District of Massachusetts on March 25, 1929, and on the same day a copy of the petition and notice of its filing were sent by registered mail to the Attorney General of the United States. (R. 7-8.) On March 28, 1929, counsel for the plaintiff filed in the office of the Clerk of the District Court an affidavit of the service and mailing of the petition and notice as above set forth. (R. 7.)

On May 16, 1929, the United States Attorney filed a general denial on behalf of the United States. (R. 8.) On May 4, 1937, the United States Attorney filed a motion to dismiss the petition on the ground that the cause of action was barred by the provisions of Section 3226 of the Revised Statutes, as amended by Section 1113(a) of the Revenue Act of 1926, and the court was, therefore, without jurisdiction to hear and determine the case. (R. 9.)

The District Court granted the Government's motion, holding that an action against the United States is not begun at least until a copy of the petition filed under Section 5 of the Tucker Act (*infra*, p. 13) has been served upon the United States Attorney in accordance with Section 6 of that Act (*infra*, p. 13), and that inasmuch as such service had not been effected in the instant case prior to the expiration of the period of limitation, the action

was barred. (R. 10-13.) The Circuit Court of Appeals affirmed the judgment of the District Court (R. 30), one judge dissenting (R. 26).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that a suit against the United States in the District Court under the Tucker Act is not begun, within the meaning of Section 3226 of the Revised Statutes, as amended, when the plaintiff's petition is filed with the Clerk of the District Court pursuant to Section 5 of the Tucker Act.

2. In holding that a suit against the United States in the District Court under the Tucker Act is not begun, within the meaning of Section 3226 of the Revised Statutes, as amended, until a copy of the plaintiff's petition is served upon the United States Attorney pursuant to Section 6 of the Tucker Act.

3. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The question of what constitutes the beginning of a suit in the District Court under the Tucker Act, within the meaning of applicable statutes of limitations, is an important question of Federal law which has not been, but should be, settled by this Court. On that question, as the Circuit Court of Appeals for the Second Circuit pointed out in *Munro* v. *United States,* 89 F. (2d)

614, 616 (now pending before this Court on a writ of certiorari, October Term, 1937, No. 218): "The authorities are in some confusion." This diversity of opinion among the lower courts on the general question is twofold. First, there are conflicting views whether, because of the provisions of the Conformity Act, a suit under the Tucker Act can be considered to be begun if, within the applicable period of limitations, the local procedure prescribed for commencing actions in state courts is followed. That phase of the question is raised by the *Munro* case. There remains the aspect of the question presented by the instant case: if the procedure prescribed by the Tucker Act, rather than local practice, is exclusively followed, what step in that procedure marks the beginning of the suit. It is self-evident that that question is of widespread application, being potentially involved in many different classes of suits against the United States in the federal district courts throughout the country. A few district courts have held, as did the court below, that a suit under the Tucker Act is not begun until a copy of the petition is served upon the United States Attorney pursuant to Section 6 of that Act (*infra*, p. 13). *Creasy* v. *United States*, 4 F. Supp. 175 (W. D. Va.); *Bachmann, Emmerich & Co., Inc.* v. *United States* (S. D. N. Y.), not officially reported, but found in 1935 C.C.H. Federal Tax Service, Vol. 3-A, par. 9427. These decisions contain no logical exposition of the reasons for holding that service of a copy of the petition marks the beginning of the suit for purposes of the statute of limitations. They indulge in broad generalizations as to the necessity for complying with

conditions imposed by the sovereign when it consents to be sued, relying principally on decisions holding the Conformity Act inapplicable to suits under the Tucker Act. Other district courts have repudiated the reasoning that the requirements of the Tucker Act, being jurisdictional, must all be complied with before suit can be deemed to be begun. Thus it has been held that the other requirements of Section 6, as to mailing a copy of the petition to the Attorney General and filing an affidavit of service and mailing, which appear to be just as mandatory as the requirement of service on the United States Attorney, are not prerequisites to the beginning of the suit, but may be satisfied after the institution of the action. *Little* v. *United States,* 54 F. (2d) 711 (W. D. La.); *Wilhelm* v. *United States,* 18 F. Supp. 600 (M. D. N. C.); *Irving Trust Co.* v. *United States* (S. D. N. Y.), not officially reported, but found in 1935 C.C.H. Federal Tax Service, Vol. 3-A, par. 9600; *Jones* v. *United States* (N. D. Ohio), not officially reported, but found in 1936 C.C.H. Federal Tax Service, Vol. 4, par. 9072.

A decision by this Court of the question presented in the instant case will supplement the Court's decision in *Munro* v. *United States,* October Term 1937, No. 218, and finally put at rest all doubts as to what does mark the commencement of a suit under the Tucker Act. In the *Munro* case the question whether service of a copy of the petition, in addition to filing the petition, is necessary to satisfy the statute of limitations was not directly before the lower court, since the plaintiff there neither filed his petition nor served a copy thereof in time. Nevertheless, that court in the course of its opinion

said (*Munro* v. *United States*, 89 F. (2d) 614, 616) that "the suit cannot be deemed to have been 'brought' until, at the least, a copy of the petition was served on the district attorney." Moreover, the Government, in its Brief in Opposition in the *Munro* case (p. 6) asserts, as an affirmative argument in support of its contention that service of a summons was not sufficient to commence the suit, that "at least the requirement of service of a copy of the petition on the United States Attorney must be complied with in order to stop the running of the limitation period". Thus the precise issue involved in the instant case has been raised in the *Munro* case. That issue, as was remarked in the dissenting opinion below (R. 26), is one of general importance. We submit that it, as well as the question directly presented in the *Munro* case, should be finally settled by this Court, in order that the limitations upon bringing suit against the United States may be clearly defined.

2. In holding that Sections 5 and 6 of the Tucker Act define, by inference, the commencement of a proceeding under that Act, the decision below conflicts with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Walton* v. *United States*, 73 F. (2d) 15. In the *Walton* case the court not only held that the Tucker Act contained no express definition of the beginning of a suit, but manifestly found no implication in the language of the statute in regard to that question, for it concluded that in the absence of a controlling act of Congress the question must be determined under the local law. Since the local statute provided that a civil action was commenced by service of a sum-

mons, the court held by analogy that a suit under the Tucker Act is commenced by service of a copy of the petition on the United States Attorney. Thus the two courts reached the same result, but by wholly inconsistent methods of reasoning. It is to be observed that application to the instant case of the principle laid down in the *Walton* case would have required a decision in favor of the petitioner, since under Massachusetts law the issuance, and not the service, of a writ marks the beginning of an action. *Pierce* v. *Tiernan,* 280 Mass. 180, 182. While we do not contend that the Circuit Court of Appeals for the Eighth Circuit was correct in applying local law, we submit that it was correct in concluding, as it clearly did conclude, that the result which it reached could not be said to flow from the provisions of the Tucker Act.

3. The decision below is erroneous. Since, as the court concedes (R. 25), the statutes do not expressly define the beginning of a suit, the intention of Congress must be determined by recourse to established principles of statutory interpretation. One such principle is that words used in a statute are to be given their ordinary meaning unless it is clear that they were intended to have some definite signification. *Woolford Realty Co.* v. *Rose,* 286 U.S. 319, 327. In common parlance, to begin is to enter upon, or take the first step in, a course of action. The first step required in bringing suit under the Tucker Act is the filing of a petition (Section 5). Service of a copy of the petition thus filed is a subsequent step, prescribed by a subsequent section (Section 6). We submit, therefore, that taking the language of Section 3226 of the

Revised Statutes in its ordinary sense, and applying it to the procedure defined in the Tucker Act, the filing of the petition marks the beginning of the suit.

Other relevant principles of interpretation are that all acts of Congress must be read in the light of the common law (*United States* v. *Sanges,* 144 U.S. 310), and that language having a meaning sanctioned by judicial decision is presumed to have been used in that sense by the legislature (*Kepner* v. *United States,* 195 U.S. 100). As stated in the dissenting opinion below (R. 26) and in the Government's Brief in Opposition in the *Munro* case (p. 7), an action at common law is regarded as "brought" or "begun", within the meaning of statutes of limitations, when the judicial machinery is set in motion—that is, in most jurisdictions, when a writ or summons is issued with an honest intention to prosecute the suit diligently. *Brown* v. *Babbington,* 2 Ld. Raymond 880; *Pierce* v. *Tiernan,* 280 Mass. 180, 182; *Anderson* v. *Aetna Life Ins. Co.,* 75 N. H. 375; cf. *Gibson* v. *Pittsburgh Transportation Co.,* 311 Pa. 312. In equity, where the procedure is more closely analagous to the procedure under Sections 5 and 6 of the Tucker Act, the suit is commenced when the bill or petition is filed, provided there is no unreasonable delay in the service of process. *Linn & Lane Timber Co.,* v. *United States,* 236 U.S. 574; *Mound City Co.* v. *Castleman,* 187 Fed. 921, 925 (C.C.A. 8th). Thus in the judicially accepted sense, as well as in common parlance, an action is begun at the time when the first formal step required by the applicable procedure is taken. There is no reason to suppose that in enacting

Section 3226 of the Revised Statutes Congress intended to adopt a different rule.[1]

The court below, relying upon the principle requiring strict compliance with conditions upon which the sovereign consents to be sued, finds an "implication from the language employed" in Sections 5 and 6 of the Tucker Act that the suit is not begun until a copy of the petition is served on the United States Attorney. The language of those sections affords no basis for the suggested inference, and we submit that it finds no support in the principle referred to by the court. The question here is not whether there must be compliance with the provisions of Section 6, but whether there must be such compliance prior to the expiration of the period of limitations. If the reasoning of the court is sound, it would seem to follow that, before the action may be regarded as begun, there must be strict compliance with all the provisions of Section 6, and not merely the provision for service on the United States Attorney; but the court declined to express any opinion on that question (R. 25-26), and the Circuit Court of Appeals for the Second Circuit, in the *Munro* case, said only that there must "at least" be service on the United States Attorney. Moreover, in every case in which the provisions as to mailing a copy of the petition to the Attorney General and filing an affidavit of serv-

[1] Compare Section 1069 of the Revised Statutes (U.S.C., Title 28, Sec. 262), providing that a petition in the Court of Claims must be filed within six years after the claim first accrues, with Section 1 of the Tucker Act (24 Stat. 505), providing that a suit against the Government, whether in the Court of Claims or in the District Court, must be "brought" within six years after the right accrues. And see *Greathouse v. United States,* 166 U.S. 601, 606.

ice have been in issue, it has been held that those provisions are procedural and may be complied with or waived after the suit has been instituted. *Little* v. *United States,* 54 F. (2d) 711 (W. D. La.); *Wilhelm* v. *United States,* 18 F. Supp. 600 (M. D. N. C.); *Irving Trust Co.* v. *United States* (S. D. N. Y.), not officially reported, but found in 1935 C.C.H. Federal Tax Service, Vol. 3-A, par. 9600; *Jones* v. *United States* (N. D. Ohio), not officially reported, but found in 1935 C.C.H. Federal Tax Service, Vol. 4, par. 9072.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES B. RUGG
H. BRIAN HOLLAND
WARREN F. FARR
EVERETT H. MAXCY
Counsel for Petitioner

APPENDIX

Section 3226 of the Revised Statutes, as amended and re-enacted by Section 1113(a) of the Revenue Act of 1926, c. 27, 44 Stat. 9:

> "SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 24 of the Judicial Code, as amended (U.S.C., Title 28, Sec. 41), derived from Section 2 of the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505:

> "SEC. 24. The district courts shall have original jurisdiction as follows:
>
> * * * * * * *

"Twentieth. Concurrent with the Court of Claims, * * * * * * * of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * * * * * No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * * "

* * * * * * *

Act of March 3, 1887 (Tucker Act), c. 359, 24 Stat. 505, 506 (U.S.C., Title 28, Secs. 762 and 763):

"SEC. 5. The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

"SEC. 6. The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district attorney of the United States in the district wherein suit is brought, and

shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises. . . . ."